

[CPLR 2016 Amendment: Affirmation in Lieu of Affidavit, Part 2; NEW YORK PRACTICE](#)

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Body

This is Part II of a discussion of the blockbuster amendment to *CPLR 2106*, entitled "Affirmation of truth of statement," which became effective on Jan. 1, 2024. The statute now allows any person to submit an affirmation in lieu of an affidavit, "with the same force and effect."

In Part I, published to the New York Law Journal on Feb. 28, 2024, we discussed several issues including the effective date of the provision, the changes to the prior language in the statute, the legislature's intent in amending the statute, federal court declarations, the continued use of affidavits and situations in which an affirmation can be used in lieu of an affidavit.

As those who have grappled with the amendment to *CPLR 2106* know, there are several additional matters that will need to be addressed by the courts. This is due largely to the fact that the legislature chose not to amend any of the other 62 provisions in the CPLR that reference an "affidavit." Given the sad state of affairs in New York's representative bodies, which are not sufficiently concerned with real procedural reform, we cannot expect any responsible legislative action to be taken to remedy the problem. Therefore, application of the statute in numerous contexts will be left largely to the courts and, from what we have heard, county clerks, which is a problem we note in the next section.

The discussion below will highlight additional potential problems presented by the amendment.

Can a Pleading or Bill of Particulars Be Verified With an Affirmation?

Verification plays a significant role in New York civil practice and verified pleadings can serve helpful functions. For example, [CPLR 105\(u\)](#) states that "[a] 'verified pleading' may be utilized as an affidavit whenever the latter is required." See David D. Siegel & Patrick M. Connors, *New York Practice* §§205, 246 (Thomson, 6th ed. 2018). As we now know, *CPLR 2106* also allows an affirmation to be used whenever an "affidavit" is required.

But this does not render verification obsolete, as there are still several situations in which verification of pleadings and the bill of particulars is required. See, e.g., [CPLR 3020](#); Dom. Rel. Law § 211 (requiring verification of pleadings in matrimonial actions); Siegel & Connors, *New York Practice* §232. Therefore, whether a pleading can be verified by an affirmation is a key question.

The verification of pleadings is addressed in [CPLR 3020](#) through [CPLR 3023](#), and verification of the bill of particulars is addressed in [CPLR 3044](#). See Siegel & Connors, *New York Practice* §§232-235. [CPLR 3020\(a\)](#) states

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that "verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true." [CPLR 3020\(d\)](#) then prescribes that "[t]he verification of a pleading shall be made by the affidavit of the party" or certain nonparties (emphasis added). [CPLR 3021](#), entitled "Form of affidavit of verification," also confirms that verification is to be performed via the affidavit of a party or a nonparty.

Parsing this statutory language, one can reasonably conclude that, under the current *CPLR 2106*, verification can be performed via the affirmation of a party or nonparty. While [CPLR 3020\(a\)](#) does require that a verification be provided "under oath," an affirmation is, in essence, "[a] solemn pledge equivalent to an oath but without reference to a supreme being or to swearing." Affirmation, Black's Law Dictionary (11th ed. 2019); see also Gen. Constr. Law §36 ("The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath."); Penal Law §210.00(1) ("Oath' includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.").

But, as discussed below, there is disagreement on whether a verification must be performed before a notary.

The language in an affirmation used to verify a pleading may need to be adjusted from the form in *CPLR 2106* to comply with the pesky requirements in [CPLR 3020](#) and [CPLR 3021](#). For example, the affirmation of a plaintiff that is used to verify a complaint should state that the "foregoing complaint is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true." See Siegel & Connors, New York Practice §234 (containing form of verification).

If a nonparty verifies, she must set forth in the affirmation the grounds for her belief of anything in the pleading that is not based upon her knowledge, and a statement of why the party is not doing the verifying. See [CPLR 3021](#). Such tinkering with the language of the form in *CPLR 2106* would seem to be permitted, as the statute states that an "affirmation shall be in substantially the following form" (emphasis added).

We have been informed that certain county clerks have rejected the filing of initiatory pleadings in 2024 that were verified with a *CPLR 2106* affirmation, but that those same types of pleadings were accepted in other counties. This inconsistency is problematic and creates a frightening scenario, especially if a rejection occurs near the expiration of the statute of limitations. Maybe county clerks have reached a different interpretation of the verification rules discussed above, but they should publish the basis for their conclusions so we can all benefit from it.

It should also be noted that Uniform Rule 202.5(d)(1) lists five instances in which a county clerk is authorized to reject papers, and a defective verification is not one of them. See [CPLR 2102\(c\)](#) ("A clerk shall not refuse to accept for filing any paper...except where specifically directed to do so by statute or rules...or order of the court"); Siegel & Connors, New York Practice §63.

It also appears that the Office of Court Administration, which publishes various forms, has concluded that:

[d]espite amendment of *CPLR 2106* to permit civil litigants to file affirmations instead of affidavits, this form [for a verified complaint in a divorce action] should still be signed before a notary public to comply with DRL 211 (matrimonial pleadings must be verified); [CPLR 3020](#) (verifications must be sworn); the no-fault ground must be sworn (DRL 170(7)); and DRL 253 (Sworn Statement of Removal of Barriers to Remarriage), all of which statutes remain in effect.

Uncontested Divorce Forms, Verified Complaint, Form UD-2 (revised Jan. 1, 2024).

Answers and Objections to Interrogatories

The provisions in [CPLR 3130](#) through [CPLR 3133](#) address the use of interrogatories. See Siegel & Connors, New York Practice §331. [CPLR 3133\(b\)](#), entitled "Form of answers and objections to interrogatories," provides that "[i]nterrogatories shall be answered in writing under oath by the party served," or by a representative of the party

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having personal knowledge of the information sought (emphasis added); see also [CPLR 3130\(2\)](#) (In matrimonial actions, "the court may order a non-party to respond under oath to written interrogatories limited to furnishing financial information concerning a party" (emphasis added)).

Based on the analysis above, where we conclude that the "oath" required for a verification can now be performed through a [CPLR 2106](#) affirmation, it would also appear that the "oath" required when submitting answers to interrogatories can be performed through an affirmation.

Must an Affirmation Signed Outside New York Comply With [CPLR 2309\(c\)](#)?

[CPLR 2309\(c\)](#), entitled "Oaths and affirmations taken without the state," provides that "[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by [a] certificate...as would be required to entitle a deed acknowledged without the state to be recorded within the state." See Siegel & Connors, New York Practice §388. "The obvious purpose of [CPLR 2309 \(c\)](#) is to assure that sworn documents executed outside of New York, perhaps under different standards or procedures, are executed in a manner that meets New York's reliability standards, as equivalent to the execution requirements for the recording of a deed." [Midfirst Bank v. Agho, 121 A.D.3d 343, 348 \(2d Dep't 2014\)](#).

The number of decisions denying relief to a party that submitted an affidavit signed outside New York that was not in compliance with the statute is legion. See McKinney's Practice Commentaries, [CPLR 2309](#), C2309:3 ("Certificates to Accompany Extrastate Oath").

The 2015 amendment adding [CPLR 2106\(b\)](#), which permitted a person "physically located outside the geographic boundaries of the United States" to sign an affirmation, was designed, in part, to alleviate the burden imposed by [CPLR 2309\(c\)](#) on parties who submit statements from people residing in foreign countries (discussing legislative history of amendment).

Nonetheless, the Second Department held in [U.S. Bank National Association v. Langner, 168 A.D.3d 1021, 1023 \(2d Dep't 2019\)](#), that "an affirmation from a person physically located outside the geographic boundaries of the United States must comply with the additional formalities of [CPLR 2309 \(c\)](#)." See *Murphy v. Metrikin*, 2021 WL 1753777, at *2 (Sup. Ct., New York County 2021) ("[CPLR 2106\(b\)](#) affirmations must still include the required certificate of conformity [under [CPLR 2309\(c\)](#)]").

The cite to [CPLR 2106](#) in *Langner* is unfortunate, and appears to have caused confusion in the case law. The affirmation in *Langner* was not a [CPLR 2106](#) affirmation, but rather an affirmation submitted as an alternative to a sworn affidavit for religious or other reasons. See McKinney's Practice Commentaries, [CPLR 2309](#), C2309:2 ("Form of Oath, Affirmation"). An affirmation of this nature must comply with the requirements in [CPLR 2309\(c\)](#) if it is signed outside New York.

Given the legislature's intention in enacting [CPLR 2106\(b\)](#), and its goals in enacting the current version of [CPLR 2106](#), it appears that affirmations signed outside New York that are in compliance with the statute should be considered without needing to comply with the provisions in [CPLR 2309\(c\)](#).

Relying on the legislature's intent, at least one court addressing similar language in the prior version of the statute has questioned the reasoning in *Langner* and concluded that "[CPLR §2106\(b\)](#) is devoid of any requirement that a litigant who had complied with that section must further submit a second document in compliance with [CPLR § 2309\(c\)](#)." *S.B. v. A.K.*, 81 Misc.3d 1079, 1084 (Sup. Ct., Westchester County 2023).

Nonetheless, lawyers need to be careful in this realm until there is appellate authority on the point. We might counsel that one should consider attempting to satisfy [CPLR 2309\(c\)](#) if an affirmation is signed outside the state, but that provision refers to "the officer who administered the oath or affirmation." [CPLR 2106](#) has never contemplated that the statement be subscribed and affirmed before an "officer," so compliance with [CPLR 2309\(c\)](#) does not seem workable in this context.

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Can Defects in Affirmations And Affidavits Be Corrected?

We have already seen several affirmations signed and filed in 2024 that do not comply with the form now contained in *CPLR 2106*. Questions will certainly arise as to whether a defective affirmation (under the current or prior version of *CPLR 2106*) can be cured. [CPLR 2001](#) can be turned to in these situations, as it grants the court power to "permit a mistake, omission, defect or irregularity...to be corrected, upon such terms as may be just" and provides that "if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." See Siegel & Connors, *New York Practice* §6 (discussing factors to be considered on motions under [CPLR 2001](#)).

Our courts have frequently grappled with the similar question of whether a defective affidavit can be corrected under [CPLR 2001](#). The courts will often permit a defective affidavit to be corrected nunc pro tunc, rather than simply refusing to consider it. See, e.g., [Parra v. Cardenas, 183 A.D.3d 462, 463 \(1st Dep't 2020\)](#) ("[W]e direct defendant to correct the defect [in the affidavit] nunc pro tunc by providing a new conforming affidavit.").

This is an eminently sound result, especially if the rejection of the affidavit will result in the denial of a summary judgment motion and it is now too late to make the motion with a proper affidavit. See [CPLR 3212\(a\)](#) (establishing deadlines for summary judgment motions); Siegel & Connors, *New York Practice* §279.

Remarkably, even when the courts exercise their discretion and permit a party to correct a defective affidavit, the invitation is not always accepted! See, e.g., *Khurdayan v. Kassir*, 2024 WL 269582, at *1 (1st Dep't 2024) ("[B]ecause plaintiff failed to follow the motion court's direction to...correct the affidavit of her handwriting expert, we do not consider the handwriting expert's affidavit.").

It must be remembered that this is an area where courts possess discretion, and not all courts are as forgiving when confronted with a defective affidavit. See, e.g., *Sachem Central School District v. Manville*, 2019 WL 3719834 (Sup. Ct., Suffolk County 2019); Siegel & Connors, *New York Practice* §388 (discussing different approaches taken by courts when addressing defective affidavits). Will they be as unbending when faced with a defective affirmation? Find out in someone else's case!

Can a defective affidavit simply qualify as an affirmation under the new *CPLR 2106*? Probably not, as it is doubtful that a defective affidavit will contain the language that the statement was made "under the penalties of perjury under the laws of New York" that *CPLR 2106* now requires.

Conclusion

It's important to conclude with a cautionary note. When confronted with any of the issues discussed above, one must tread lightly while *CPLR 2106* settles in.

The amended *CPLR 2106* will relieve burdens on parties and nonparty witnesses and was trumpeted by proponents as a "progressive" improvement to increase "access to justice." Maybe it is attributable to nineteen years of Catholic education, but we believe that the notary process brought some enhanced degree of truthfulness to our proceedings, however slight.

One must remember that the affidavit requirements often saved a homeowner from a bank's sloppy documentation, and rescued a defendant who was subject to a default judgment based on a dubious affidavit of service. Affirmations will now satisfy in these circumstances.

This brings to mind the famous exchange between Sir Thomas More and William Roper in Robert Bolt's classic, "A Man for All Seasons":

Roper: "So, now you give the Devil benefit of law!"

More: "Yes! What would you do? Cut a great road through the law to get after the Devil?"

Roper: "Yes, I'd cut down every law in England to do that!"

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More: "Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's, and if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"

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